MUI BANK BHD. JOHOR

v.

TEE PUAT KUAY @ TEE PUAT KWAY

HIGH COURT, JOHOR BAHRU
DATO' ALAUDDIN BIN DATO'
MOHD SHERIFF J.
[ORIGINATING SUMMONS
NO: 37 OF 1992]
22 JULY 1993

INDUSTRIAL LAW: Application for order of certiorari to quash award of Industrial Court - Whether Industrial Court had committed an error of law and jurisdiction in coming to its decision - Whether High Court entitled to interfere in award made by Industrial Court.

The respondent was employed as a Cash Officer cum Operational Officer at the applicants' Segamat Branch. A domestic enquiry set up by the applicant found the respondent to have misappropriated a sum of RM40,000 being the Bank's money which was held in the respondent's custody. The respondent was subsequently dismissed by the applicant and the respondent claimed that the dismissal was without just cause or excuse and caused a reference to be made to the Industrial Court.

The Court after having heard both parties made an award that the respondent be reinstated with the Bank without loss of salaries, allowances and all other benefits he was entitled to from the date of his dismissal. The applicant filed an application for an order of *certiorari* to remove into the High Court for the purpose of it being quashed the award made by the Industrial Court.

In the face of the privative clause in s. 33B(1) of the Industrial Relations Act 1967 the question that arose was whether there was shown that the award made by the Industrial Court contained a jurisdictional defect or an error of law which affected jurisdiction entitling the High Court to interfere.

Held:

[1] All the grounds relied on by the applicant in essence impugns the decision of the Industrial Court on its merits. Bearing in mind that the Court was not sitting as an appellate Court to review the findings of an inferior tribunal, the applicant had failed to show that the award made by the Industrial Court in favour of the respondent contained a jurisdictional defect or an error of law which affected jurisdiction.

[2] Having reviewed the evidence there was in fact no error of law on the part of the Industrial Court. There was no excess or lack of jurisdiction when the Industrial Court made its award.

[Certiorari refused. Motion dismissed. Applicant to pay taxed costs of proceedings to respondent].

Cases referred to:

Mak Sik Kwong (No. 2) [1968] 2 MLJ 175 ***(refd)***
Chan Siew Kim [1978] 1 MLJ 144 ***(refd)***
South East Asia Fire Bricks Sdn. Bhd. [1980] 2 MLJ 165 ***(refd)***
Anisminic Ltd. v. Foreign Compensation Commissioner [1969] 2 AC 147 ***(refd)***
Armah v. Government of Ghana [1968] AC 192 ***(refd)***
Rex v. Nat Bell Liquors Ltd. [1922] 2 AC 128 ***(refd)***
The Queen v. Justices of the Central Criminal Court [1886] 17 QBD 598 ***(refd)***
Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Industrial Court of Malaysia [1984] 2 CLJ ***(refd)***
Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers [1991] 2 CLJ 881 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)
Industrial Relations Act 1967, ss. 20(3), 30(1)(5) & 33B(1)

For the applicant - Nagarajah Muttiah; M/s. Shook Lin & Bok
For the respondent - Gana Muthusamy; M/s. Gana Muthusamy & Co.

JUDGMENT

Alauddin bin Dato' Mohd Sheriff J:

MUI Bank Berhad Johor, the applicant, filed an application by way of notice of originating motion (enclosure 10) for -

An order for *certiorari* to remove into this Court for the purpose of it being quashed the award of the Industrial Court made on 9 October 1992 that is Industrial Court Award No. 270 of 1992.

The grounds as set forth in the copy of the statement filed on 31 October 1992 are -

(1) The Industrial Court committed an error of law and jurisdiction in that it concluded that on a charge of misappropriation the Domestic Inquiry is required to find that

the evidence would "... conclusively point to the claimant" as being guilty.

(2) The Industrial Court committed an error of law and of jurisdiction by asking itself the wrong question that is whether the Domestic Inquiry had conclusively found the respondent to be guilty.

(3) The Industrial Court committed an error of law and jurisdiction in concluding that the applicant "condoned" the actions of the respondent within the meaning of that term and law.

(4) The Industrial Court committed an error in law and jurisdiction by invoking s. 114(g) of the Evidence Act when there was no clear evidence before the Court that permitted the said provision to be invoked.

(5) The Industrial Court committed an error of law and jurisdiction by requiring that the "authenticity of transcribed reports and proceedings and the tapes" had to be proved when there was no challenge to the same in the course of the hearing.

(6) The Industrial Court committed an error of law and jurisdiction by awarding the relief of reinstatement which in law is not appropriate in the circumstances of the case.

(7) The Industrial Court committed an error of law and jurisdiction by failing to ask itself the appropriate questions to decide if the charge of misappropriation could be substantiated.

Before proceeding to consider the grounds put forth some brief background is necessary. The respondent, Tee Puat Kuay joined the MUI Bank Segamat Branch on 16 November 1982 as a Class 1 Officer. On 9 July 1987 he was appointed a Cash Officer cum Operational Officer. On at least two occasions during the course of his service with the Bank the respondent received letters of merit in recognition of his performance and service with the Bank. All along he had no problems with the Bank.

On 21 August 1989, the day of the alleged incident, everything appeared normal when the Bank opened for business. As usual the cash till was taken out from the vault by the respondent and kept by him throughout the day. The respondent, during the course of the day dispensed cash whenever a teller requisitioned for it. He took the cash from the till kept under his table. When the Bank closed for business that day it was found that there was a shortfall of RM40,000 from the till and in the books some alterations had been made on entries for the 19 August 1989. They were unauthorised alterations as they did not bear the initial of the respondent or the Assistant Manager. The respondent, the Assistant Manager, the Manager and all the staff searched the Bank from top to bottom, but the money was not found.

In the aftermath the respondent was relieved of his duties as Cash Officer and relegated to an unspecified post. As he was not suspended from work, he resumed duties as usual.

However, a week later that is on 28 August 1989 at about 8.00 a.m. the respondent whilst at his house received a mysterious phone call informing him that the riddle of the missing money could be resolved if he could locate a certain red dustbin near a certain restaurant in Segamat town. The respondent immediately passed this information to the Assistant Manager and the respondent together with his house-mate proceeded to the place of rendezvous followed by the Assistant Manager soon after. True enough, out of the red dustbin they fished out a bundle wrapped up in newspaper and brought it to the Bank. On opening the bundle they found a stack of RM100 bills which amounted to RM29,500.

The respondent however could not come up with an explanation at that time as he was confused and under pressure. Under those circumstances he agreed to make good the missing money.

In September 1989, the respondent was transferred to MUI Bank Headquarters in Kuala Lumpur, where he was assigned to the general services department until his services were terminated on 19 January 1990 following the verdict of a Domestic Inquiry set up by the Bank, which found that the respondent had "misappropriated a sum of RM40,000 being the Bank's money which was held in the respondent's custody".

The respondent claimed that the dismissal was without just cause or excuse, unfair and unjust. Arising out of the dismissal, the Honourable the Minister of Human Resources, Malaysia, made a reference to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 (IRA).

At the end of the reference after having heard both parties the Industrial Court made an award that the respondent be reinstated with the Bank without loss of salaries, allowances and all other benefits to which he was entitled to from the date of dismissal. Hence the present application before me.

As clearly spelt out in s. 33B(1) of the Industrial Relations Act 1967 (IRA) an award, decision or order of the Industrial Court, shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court.

This particular section enacts a privative clause precluding *certiorari* in respect of any award, decision or order of the Industrial Court under the Act.

However it was held in the case of *Mak Sik Kwong (No. 2)* [1968] 2 MLJ 175 that a privative clause of this nature is not operative in the face of a jurisdictional defect or fraud and has no effect at all as regards jurisdictional review. The same was reaffirmed in *Chan Siew Kim's* case [1978] 1 MLJ 144. Both these cases were cited with approval by the Privy Council in the *South East Asia Fire Bricks Sdn. Bhd.* case [1980] 2 MLJ 165 where in considering the effect of the above provision, (then s. 29(3)) the Privy Council decided that a distinction would have to be made between an error of law which affects jurisdiction and an error of law which does not affect jurisdiction. The distinction is shown in the judgment at page 167 where Lord Fraser said:

> But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice then the ouster will be effective.

In that same case the Privy Council made reference to the decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commissioner* [1969] 2 A.C. 147 where Lord Reid said that there are many cases where, although the tribunal had jurisdiction to enter on an inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. For example, it may have given its decision in bad faith or it may have made a decision which it had no power to make or it may have failed in the course of the inquiry to comply with the requirements of natural justice. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. Lord Reid continued at page 171 as follows:

> I do not intend this list to be exclusive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

I shall now consider the grounds relied upon by the applicant in this application.

Proof of Misappropriation [Grounds (1)(2)(7)].

The Industrial Court having heard witnesses for the applicant and the evidence of the respondent and considered all the facts and documents relevant to the reference came to a conclusion that there was no direct evidence that the respondent had misappropriated the Bank's RM40,000. It said that suspicions and conjectures were abound but the circumstantial evidence did not conclusively point to the respondent.

Where the applicant is relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistably to the guilt of the respondent. Mere suspicion, as in this case, therefore could not be accepted as sufficient ground for dismissal.

The Industrial Court found it difficult to accept that the inquiry held by the applicant in this case acted fairly and justly and its decision could not be supported by the Court.

On the facts of the case the Court was of the view that the dismissal did not reflect fair industrial practice and was not in accordance with good conscience and equity as provided in s. 30(5) of the IRA 1967. The Court found that the dismissal of the respondent was without just cause or excuse.

From the findings of the Industrial Court I cannot see how it can be said that the Court had committed an error of law and jurisdiction. It is perfectly within the jurisdiction of the Court to decide based on evidence before it whether the charge of misappropriation had been made out.

It was alleged by the applicant that the Industrial Court was setting too high a standard with respect to burden of proof. According to the applicant a "reasonableness test" was sufficient. With respect, I do not agree. I am of the opinion that the Industrial Court, based on the facts before it had asked itself the right question and decided correctly in law and there is nothing to suggest that it had acted without jurisdiction. It was essentially a question of fact before the Court.

Even assuming that the decision of the Court was wrong in law, does it affect jurisdiction? In the case of *Armah v. Government of Ghana* [1968] A.C. 192 Lord Reid had this to say:

> If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction ...

The applicant here merely had a genuine belief in the guilt of the respondent but they had no reasonable grounds for that belief and they had not carried out as much investigation into the matter as was reasonable in all the circumstances. The Court's decision should therefore be upheld.

Condonation of respondent's Actions (Ground 3)

The applicant having found that the respondent was guilty of "misappropriation" allowed the respondent to continue working in the Segamat Branch and subsequently transferred him to their headquarters in Kuala Lumpur where he worked for about 5 months before he was dismissed. For this reason the Industrial Court found that the applicant had 'condoned' the respondent's actions.

The question that arises here is whether the Industrial Court was correct in law in finding 'condonation' on the facts of the matter. To my mind, misconduct is deemed 'condoned' where an election is made to, retain an employee guilty of misconduct. As such, I cannot see how the Industrial Court had committed an error of law in coming to that decision. There is no such thing as a law of condonation. It is essentially a question of fact depending on the circumstances of the matter.

Section 114(g) Evidence Act 1950 (Ground 4)

The Industrial Court found that the padlock used by the respondent to lock the till was a vital clue in the case and this padlock was not produced before the Court. Upon discovering that RM40,000 was missing, the applicant relieved the respondent of his duties immediately. The same night the respondent handed over to the Bank the till, the keys and the padlock. But CW1, the Assistant Manager denied the padlock was returned by the respondent. However, in his evidence he said when he took over as Cash Officer from the respondent he used the same padlock.

Based on these facts the Industrial Court invoked the provisions of s.114(g) against the applicant. I find that it is perfectly in order for the Court to have done so. There is no reason why adverse inferences should not be drawn in the appropriate circumstances against a party who fails to raise such evidence especially where the evidence could have been produced, as in this case.

It was contended by the applicant that there was no clear evidence before the Court that permitted the said provision to be invoked. With regard to this it was held in *Rex v. Nat Bell Liquors Ltd.* [1922] 2 AC 128 that improper rejection of evidence or even the making of a decision which is not supported by evidence does not establish jurisdictional error.

Proof of the "authenticity of transcribed reports and proceedings and the tapes" (Ground 5)

Under this ground it was contended on behalf, of the applicant that since there was no objection raised by the respondent in the course of the hearing it was wrong for the Industrial Court to rule that the authenticity of the above mentioned items was not proved to the Court. By so deciding, the Court is alleged to have committed an error of law and jurisdiction.

Under these circumstances, I think it is really a matter for the Court to decide, even though there was no objection raised. An erroneous omission to object to inadmissible evidence does not make it admissible. It is the duty of the Court to exclude such inadmissible evidence even though no objection is taken to its admissibility, by the parties.

I therefore find that although there was no objection raised by the respondent in the course of the proceedings it is perfectly proper for the

Court to have ruled as it did. Its decision cannot be said to amount to an error of law or jurisdiction. Even if it was an error in law it certainly did not affect jurisdiction.

It was held in *The Queen v. Justices of the Central Criminal Court* [1886] 17 QBD 598 that where an authority has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact.

Relief of reinstatement (Ground 6)

It was the applicant's argument that in the circumstances of the case it was not appropriate in law for the Industrial Court to award relief of reinstatement.

The power to make an award by the Industrial Court is provided by s. 30(1) of IRA which reads-

> The Court shall have power in relation to a trade dispute referred to it **or in relation to a reference to it under s. 20(3)**, to make an award (including an interim award) relating to all or any of the issues.
> (emphasis added).

It would clearly appear therefore that if a workman does not require reinstatement there would not be a reference to the Industrial Court under s. 20(3) of IRA. Although, as contended by the applicant, compensation could be ordered, it is not wrong for the Court to order reinstatement. Each case has to be considered on its own merits and in reaching a final decision an attempt must be made to reconcile the conflicting claims made by the workman and the employer. The workman is entitled to security of service and should be protected against wrongful dismissal and so the normal rule would be reinstatement in such cases. A decision will have to be made in a spirit of fairness and justice.

In this case the respondent had been working in the banking industry for about 20 years and since the applicant is a big organisation with a nationwide network it will not be difficult to place the respondent in any one of its branches without loss of confidence. The mere assertion of the employer that he has lost confidence cannot compel the Industrial Court to refrain from passing an order of reinstatement.

Under the circumstances of this case I hold that the order of reinstatement by the Industrial Court is a fit and proper order and it cannot be said that the Court had committed a jurisdictional error.

From my observation all the seven grounds relied upon by the applicant in this application in essence impugns the decision of the Industrial Court on its merits. From the tone of his submission before me there was no doubt that Counsel for the applicant was really engaged in arguing the application on the merits of the trade dispute.

It must be borne in mind that the Court here is not sitting as an appellate Court to review the findings of the inferior tribunal and the Federal Court in *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Industrial Court of Malaysia* [1984] 2 C.L.J. at page 9 said:

> The High Court, it must be observed, has no jurisdiction to consider the merits of the case, its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit.

Words to the like effect were echoed in a more recent case of *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* [1991] 2 CLJ 881 where the Supreme Court (at page 885) said:

> It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition.

and at page 887 it continued:

> On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute - '*de novo*' and decide it on its merits. The Industrial Court had heard evidence from both sides and submissions by their counsels and it came to a decision exculpating Tang Seng Khow from the allegation in the 4th charge. Clearly this is a case where the tribunal had by virtue of the powers entrusted upon it by the Industrial Relations Act 1967 to weigh and evaluate the evidence of witnesses for the company and

the evidence of Tang Seng Rhow. It is surely not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come.

It is my considered view in the light of the authorities cited that assuming that there is any error of law in this matter it was made within jurisdiction, but I find there is in fact no such error of law. In the result I find that there was no excess or lack of jurisdiction when the Industrial Court made its award.

In the event *certiorari* is refused. The motion is dismissed. The respondent will have the taxed costs of these proceedings.

PUBLIC PROSECUTOR

v.

AMINAH BINTE ASGALI

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL TRIAL NO. 4 OF 1988]
22 JUNE 1993

DANGEROUS DRUGS: Charge under s. 39B(1)(a) Dangerous Drugs Act 1952 - Presumption of knowledge - Defence called - Whether presumption of knowledge rebutted - Whether defence had created doubt in prosecution's case.

The accused was charged with trafficking in 840 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act.

It was the case for the prosecution that, as a result of information received, a police party laid an ambush and apprehended the accused with a plastic bag which on examination contained a tyre tube which was filled with cannabis.

The accused was called to enter upon her defence and she claimed that she had been set up by a person called Inin who had left the tyre tube in her food stall telling her that he would return for it later. The question that arose was whether the accused had managed to rebut the presumption of trafficking in dangerous drugs.

Held:

[1] The evidence of the accused that one Inin had placed the cannabis in her stall and that she was caught holding the cannabis when she was about to return the same to Inin who came to collect it with another person who later arrested her was accepted. In the circumstances the accused's evidence that she had no knowledge that there was cannabis hidden inside the tyre tube was accepted and the accused had managed to rebut the presumption of trafficking.

[2] It could not be concluded that the accused was not worthy of credit because of contradictions in her evidence. Contradictions and discrepancies are to be expected when the passage of time, from the time of the event to the date of the trial, is long, as in this case.

[Accused acquitted and discharged].